IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	NO. 11-445
RAGIB WITHERSPOON,	:	
Petitioner.	:	

Jones, II J. October 27, 2015

MEMORANDUM

Ragib Witherspoon ("Petitioner") filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, alleging that the sentencing enhancement he received for a prior predicate offense, pursuant to 18 U.S.C. § 924(e), should be invalidated in light of the vacatur of a prior offense in the Commonwealth of Pennsylvania (docketed at CP-51-CR-0006437-2008). (Dkt No. 26 [hereinafter Pet.].)

The Government responded that (1) Petitioner's appellate waiver from his Plea Agreement precludes this Petition in the first place, and (2) this type of claim cannot constitute a miscarriage of justice because the mandatory minimum applied was based on other prior convictions, regardless of the vacated conviction. (Dkt No. 31 [hereinafter Resp.].) Defendant replied that the vacated conviction was one of the only three listed in the Plea Agreement; thus, enforcement of the appellate waiver would constitute a miscarriage of justice as it would allow Petitioner to remain convicted under an inapplicable mandatory minimum. (Dkt No. 34 [hereinafter Rep.].)

The Court finds that the appellate waiver is enforceable as it was entered into knowingly and voluntarily. Further, there is no risk of a miscarriage of justice here, as the record unquestionably shows that the enhancement was the result of at least three prior convictions which are not vacated. Petitioner's Motion is denied, dismissed, and a certificate of appealability shall not issue.

I. Background

Petitioner received fifteen years of incarceration pursuant to 18 U.S.C. § 924(e), which requires that a person convicted under 18 U.S.C. § 922(g) who has three previous convictions for

a "serious drug offense" is subject to a mandatory minimum of not less than fifteen years. Petitioner asserts that one of the three convictions on which this mandatory minimum was applied has been vacated.

On February 13, 2009, Petitioner pled guilty to a felony drug crime in the Court of Common Pleas of Philadelphia Count (the "2009 conviction"). *Commw. of Pa. v. Witherspoon*, Dkt No. CP-51-CR-6437-2008. On July 3, 2014, the Court of Common Pleas of Philadelphia County granted Petitioner's Motion for Post Conviction collateral relief. *Id.* The District Attorney's Office chose not to retry the case, and moved to *nolle pros* the case. *Id.* Thus, Petitioner argues that he should not still be subject to the mandatory minimum under § 924(e) because he only has two prior "serious drug offense" convictions. In contrast, the Government argues that the application of this mandatory minimum was based on five "serious drug offenses" convictions, four of which remain valid.

The Court now endeavors to provide the context necessary to examine this question. On August 29, 2011, a Grand Jury indicted Petitioner on three counts. (Dkt No. 1 [hereinafter Indict.].) On May 21, 2013, the Government submitted a Guilty Plea Memorandum. (Guilty Plea Memorandum [hereinafter Plea Mem.].) The Memorandum stated that "[o]n each of the following dates, the defendant was convicted in Court of Common Pleas, Philadelphia Count [*sic*] of possession of cocaine with intent to deliver: September 13, 2004,[1] October 20, 2006, February 13, 2009." (Plea Mem. at 5.)

On May 29, 2013, Petitioner pled guilty to the third count of the Indictment: he knowingly possessed a firearm despite having been convicted of a Pennsylvania crime punishable by imprisonment for a term exceeding one year. (Dkt No. 17; Plea Document, Dkt No. 18 [hereinafter Plea Agreement].) Count 1 and 2 were dismissed. (Dkt No. 21.)

The Plea Agreement was entered pursuant to Fed. R. Crim. P. 11(c)(1)(C) and stated that:

> 9. [T]he defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under…28 U.S.C. § 2255, or any other provision of law.

[1] The Government's Guilty Plea Memorandum states "September 13, 2004," however, the Presentence Report states "September 3, 2004." (*Compare* Plea Mem. at 5 *with* Presentence Report [hereinafter PSR] ¶ 31.) Upon independent investigation, the Court confirms that the referenced conviction occurred on September 3, 2004. *Commw. of Pa. v. Witherspoon*, Dkt No. CP-51-CR-1203221-2003.

a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:
    (1) the defendant's sentence on any count of conviction exceeds the statutory maximum for that count…
    (2) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines; and/or
    (3) the sentencing judge, exercising the Court's discretion pursuant to *United States v. Booker*, 543 U.S. 220 (2005), imposed an unreasonable sentence above the final Sentencing Guidelines range determined by the Court.

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

(Plea Agreement ¶ 9.)

At the Plea Hearing, the Court engaged in the following discussion with counsel of Petitioner's prior convictions:

> THE COURT: …Now counsel, let me just inquire right now, are either of you aware of anything within the records of Mr. Witherspoon beyond the conditions for the felonies that were referenced in the plea agreement, which I believe were three drug convictions? Do you know if there were any other convictions?
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> MR. THOMPSON [DEFENSE COUNSEL]: He has five total, Your Honor. I have actually pulled all of the records that are available from the Court of Common Pleas with respect to three of them and have satisfied myself that they are, in fact, felonies that meet the definition for serious drug offense pursuant to Title 18-924(e).
>
> THE COURT: All right. And beyond the three cocaine convictions, what were the other two?
>
> MR. THOMPSON: They were drug offenses…felony drug, but I have not been able – they're referenced as felony drug offenses, but I was not able to personally secure the records from the Court of Common Pleas, they're not available. Well, the notes of testimony aren't available, let's just say that.
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> MR. LEVERETT [GOVERNMENT COUNSEL]: Specifically, with respect to the Defendant's criminal history, the Government has uncovered the following information relevant to those matters.
>
> He was convicted in 2004 with possession of cocaine and he was also convicted in 2001 with possession of cocaine. Those were disposed of. I don't have the CP numbers or those convictions but based on the information that I have here, they were both

probationary terms and the other three convictions that he has are the ones referenced in the guilty plea memorandum.

(Plea 13:8-15:1.)

On September 16, 2013, the Government submitted a sentencing memorandum. (Dkt No. 19 [hereinafter Gov't Sent. Mem.].) The Probation Office also submitted a Presentence Report ("PSR") on August 16, 2013, revised on September 18, 2013. (Presentence Report [hereinafter PSR].) This Report outlined that Petitioner had the following prior convictions for serious drug offenses, in addition to the now-vacated case:

1. On September 3, 2004, Petitioner pled guilty to the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance in violation of 35 P.S. § 780-113(a)(30) in the Court of Common Pleas of Philadelphia County, Criminal Case Number CP-51-CR-1203221-2003. (PSR ¶ 31.)

2. On October 20, 2006, Petitioner pled guilty to the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance on June 2, 2005, in violation of 35 P.S. § 780-113(a)(30), in the Court of Common Pleas of Philadelphia County, Criminal Case Number CP-51-CR-0908591-2005. (PSR ¶ 33.)

3. On October 20, 2006, Petitioner pled guilty to the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance on February 9, 2006, in violation of 35 P.S. § 780-113(a)(30) in the Court of Common Pleas of Philadelphia County, Criminal Case Number CP-51-CR-0510081-2006. (PSR ¶ 34.)

4. On November 28, 2006, Petitioner pled guilty to the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance in violation of in violation of 35 P.S. § 780-113(a)(30) in the Court of Common Pleas of Philadelphia County, Criminal Case Number CP-51-CR-1301216-2006. (PSR ¶ 32.)

On September 26, 2013, the Court sentenced Petitioner. (Dkt No. 20; Judgment, Dkt No. 22 [hereinafter Judg.].) At the Sentencing Hearing, Defendant stated that he had no objections to the PSR. (Sentencing Hearing Transcript, Sept. 26, 2013 [hereinafter Sent.] 5:15-6:5.) Thereto, the Court adopted the PSR's findings of fact and conclusions of law. (Sent. 6:6-10.) In reciting the relevant facts for sentencing, the Court stated that "defendant has five convictions for felony controlled substance offenses within the Philadelphia Court of Common Pleas." (Sent. 7:10-12.) During the Government's argument, the Government reiterated that Petitioner had five prior convictions that all supported the fifteen year mandatory minimum under § 924(e). (Sent. 9:18-

20.) The Court sentenced Petitioner to the mandatory minimum of fifteen years imprisonment. (Sent. 19:13-21:22.)

II. Legal Standard

A § 2255 Motion to Vacate, Set Aside, and/or Correct Sentence may be granted on the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255.

A district court must grant an evidentiary hearing when the records in the case are "inconclusive on the issue of whether movant is entitled to relief." *United States v. McCoy,* 410 F.3d 124, 131 (3d Cir. 2005) (citing *Solis v. United States*, 252 F.3d 289, 294-95 (3d Cir. 2001)). A § 2255 motion "can be dismissed without a hearing [only] if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Id.* (quoting *Engelen v. United States*, 68 F.3d 238, 240 (8th Cir. 1995)).

"The standard governing…requests [for evidentiary hearings] establishes a reasonably low threshold for habeas petitioners to meet." *Id.* (quoting *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001)). A pro se habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. *Lewis v. Attorney General*, 878 F.2d 714, 721-22 (3d Cir. 1989). A pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

The Third Circuit has held that a defendant's waiver of appellate rights or rights to collaterally attack a conviction or sentence shall be enforced so long as it was entered knowingly and voluntarily and enforcement of the waiver would not create a miscarriage of justice. *See United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001). The Court will analyze whether (1) Petitioner entered his plea agreement knowingly and voluntarily, (2) whether one of the specific exceptions set forth in the Plea Agreement prevents the enforcement of the waiver, and (3) whether the enforcement of the waiver would create a miscarriage of justice. *United States v. Mabry*, 536 F.3d 231, 244 (3d Cir. 2008).

An appellate waiver entered into knowingly and voluntarily may still be unenforceable if its enforcement would create a miscarriage of justice. *United States v. Jackson*, 523 F.3d 234, 242-43 (3d Cir. 2008); *United States v. Goodson*, 544 F.3d 529, 536 (3d Cir. 2008). The waiver must be enforced unless the Court identifies "the unusual circumstance" of "an error amounting to a miscarriage of justice" in his sentence. *Khattak*, 273 F.3d at 562. To determine whether enforcement would create a miscarriage of justice, the Court considers:

> [T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

Id. at 563 (quoting *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001)). The "miscarriage of justice" exception to enforcement of a voluntarily and knowingly entered waiver should be applied "sparingly and without undue generosity." *United States v. Wilson*, 429 F.3d 455, 458 (3d Cir. 2005) (quoting *Teeter*, 257 F.3d at 26.)).

III. Discussion

a. The Plea Agreement is enforceable as it was entered into knowingly and voluntarily.

The record from the Plea Hearing shows that Petitioner entered into the Plea Agreement knowingly and voluntarily. The Court ensured that Petitioner was physically and mentally fit to proceed with the Hearing. (Plea Hearing Transcript, May 22, 2013 [hereinafter Plea] 6:23-24:12.) Petitioner testified that he had read and understood the Indictment, (Plea 7:13-8:6), that he was satisfied with his representation, (Plea 8:7-10), and that he had read and understood the Plea Agreement. (Plea 8:23-10:4.) Further, he testified multiple times that he pled of his own free will. (Plea 10:17-11:6, 30:14-31:22.) The Court explained to Petitioner the various rights he was giving up by pleading guilty. (Plea 11:7-14, 20:13-27:16.) Specifically, Petitioner stated that he understood the appellate waiver, and its exceptions, in his Plea Agreement. (Plea 24:17-26:5.)

Petitioner affirmed that he understood that a prior conviction could affect his guideline sentencing range. (Plea 11:18-24.) The Court stated that the maximum and mandatory minimum sentence were "mandatory 15 years in prison, 5 years supervised release, a $250,000 fine, and a $100 special assessment." (Plea 15:5-20.) Such amounts were consistent with those stated in the Plea Agreement. (Plea Agreement ¶ 3.) Petitioner affirmed the representation of the facts of the

case as outlined by Government's counsel. (Plea 29:3-10.) The Court held that Petitioner voluntarily and knowingly entering a Plea of guilty. (Plea 32:10-22.)

The issue for the Court is whether or not the Plea Agreement was invalidated by the omission in the Plea Agreement and at the Plea Hearing of any reference to the other two convictions upon which Petitioner's sentence could be brought under the mandatory minimum requirements of § 924(e). The Court endeavors to provide clarity on the context of this argument. In the Plea Memorandum, the Government stated "on each of the following dates, the defendant was convicted in Court of Common Pleas, Philadelphia Count [*sic*] of possession of cocaine with intent to deliver: September 13, 2004, October 20, 2009, and February 13, 2009." (Plea Mem. at 5.) First, the September 13, 2004 date is incorrectly stated. The correct date of Petitioner's conviction in 2004 was September 3, 2004. Second, on the referenced October 20, 2009 date, Petitioner was actually convicted in two separate cases, for two separate events. However, the Plea Memorandum does not make it clear that this October 20th date is reflective of two distinct felony drug convictions, either of which could provide support for the mandatory minimum. Third, the Plea Memorandum does not reference the November 28, 2006 conviction that provides another independent basis for the mandatory minimum.

At the Plea Hearing, the errors in the Plea Memorandum were not corrected. Counsels for both parties and the Court referred to the "three" convictions listed in the Plea Memorandum. (Plea 13:13-15:4.) Petitioner's counsel stated that Petitioner had "five total" convictions, but stated that he was not sure what the underlying crimes were. (Plea 13:15.) Government counsel clarified that the two additional convictions beyond the "three" listed in the Plea Memorandum occurred in 2001 and 2004. (Plea 34:15-15:1.) Thus, even the "five" explained to Petitioner at the Plea Hearing were not in fact the "five" upon which the Court ultimately sentenced Petitioner. Thus, prior to Petitioner's plea, neither counsel, nor the Court, apprised Petitioner that his two convictions on October 20, 2006 and his conviction on November 28, 2006 could all count as bases for the mandatory minimum.

Such clarity was provided later by the Presentence Report ("PSR"). The PSR spells out the additional prior felony convictions that provide the basis for Petitioner's mandatory minimum. Of these five convictions, four remain applicable today. Thus, prior to Sentencing, Petitioner was fully apprised of the prior convictions that could account for the enhancement. Moreover, at the Sentencing Hearing, the Court ensured that Petitioner had read the PSR and did

not object to it, (Sent. 5:15-6:5), adopted the PSR's findings of fact, (Sent. 6:6-10), and stated that "defendant has five convictions for felony controlled substance offenses within the Philadelphia Court of Common Pleas." (Sent. 7:10-12.) The Court sentenced Petitioner to the sentence that Petitioner consented to in the Plea Agreement.

The errors in the Government's Plea Memorandum and in its statements at the Plea Hearing do not alone, or together, constitute grounds to find that Petitioner did not enter into the Plea knowingly and voluntarily. First, the Court notes that at the time of the Plea Agreement, nothing included in the Agreement was incorrect. At the time of the Plea Agreement, the three referenced prior convictions all remained valid.

Second, this Plea Agreement was made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). (Plea Agreement ¶ 5.) Under this Rule, the Court may "accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." Fed. R. Crim. 11(c)(3)(A). In this case, the Court accepted the Plea but deferred acceptance of the Plea's sentencing suggestion until review of the PSR. At the Plea Hearing, the Court ordered Probation to prepare a PSR and stated that the Court would rely heavily on the information presented there when deciding the sentence. (Plea 33:2-25.) The Court informed Petitioner that he had the opportunity to lodge objections to the PSR. (Plea 33:15-25.) Thus, in accordance with Fed. R. Crim. P. 11, the Court apprised Petitioner that the Court was not yet adopting the requested sentence in the Plea Agreement and that the Court would defer sentencing until thorough review of the PSR. The PSR listed all five relevant prior convictions. (PSR ¶ 32.) At his Sentencing Hearing, Petitioner did not lodge any objections to the PSR regarding these five prior convictions. (Sent. 5:15-6:5) The Court explicitly stated at the Sentencing that it adopted the findings of fact in the PSR, and specifically mentioned the PSR's finding of fact that Petitioner had five prior convictions. (Sent. 6:6-10, 7:10-12.)

Thus, the Plea Agreement and the Court's colloquy at the Plea Hearing both apprised Petitioner that the Court could consider evidence from the PSR when determining Petitioner's sentencing. Subsequently, the Court considered evidence from the PSR in determining Petitioner's sentencing. The fact that more prior convictions were uncovered by the PSR than were found in the Government's Plea Memorandum does not mean that Petitioner did not enter into the Plea Agreement knowingly.

The Court's review of the record reveals again that the Plea Agreement was entered into knowingly and voluntarily. Thus, the appellate waiver in the Plea Agreement is enforceable.

b. None of the exceptions in the Plea Agreement apply to Petitioner's claim.

The outlined exceptions in the Plea Agreement do not apply. First, the sentence did not exceed the statutory maximum. Petitioner pled guilty and was convicted under 18 U.S.C. § 922(g). Because Petitioner had at least three prior convictions for serious drug offenses, the mandatory minimum and maximums he faced were 180 months to lifetime imprisonment. 18 U.S.C. § 924(e). Petitioner received a sentence of 180 months. As such, he did not receive a sentence exceeding the statutory maximum.

Second, the Court did not erroneously depart upward pursuant to the Sentencing Guidelines. Petitioner's base offense level was 24. U.S.S.G. § 2K2.1(a)(2). Because Petitioner possessed a firearm while in possession of crack cocaine, the offense level was increased to 28. U.S.S.G. § 2K2.1(b)(6)(B). Because Petitioner possessed the firearm in connection with a controlled substance offense, the offense level became 34. U.S.S.G. § 4B1.4(b)(2). Due to Petitioner's acceptance of responsibility, his offense level was reduced to 31. U.S.S.G. § 3D1.1(a), (b). Due to his prior felony convictions, Petitioner's criminal history category was calculated as VI. (PSR ¶ 40 (citing U.S.S.G. § 4B1.4(c)(1), (2), (3).) The advisory sentencing guidelines range was 188-235 months of imprisonment. (PSR ¶¶ 84-85.) The Court did not erroneously depart upward.

Third, the sentence did not exceed the final Sentencing Guidelines range. The sentence of 180 months was below the minimum of the guideline range. In conclusion, no exception to the appellate waiver in the Plea Agreement applies.

c. Enforcement of the waiver to defeat Petitioner's claims would not constitute a miscarriage of justice.

Petitioner's status as an armed career criminal, and the impact that such a designation had on his sentence, did not hinge on the state conviction that has been overturned. As such, the vacation of that conviction does not affect the integrity of his sentence in any way.

Under 18 U.S.C. § 924(e), a person convicted under 18 U.S.C. § 922(g) who has three previous convictions for a "serious drug offense" is subject to a mandatory minimum of not less than fifteen years. Serious drug offense include "an offense under State law, involving the manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled

substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). Petitioner argues that one of the three convictions upon which his sentence was based has been vacated. As addressed above, Petitioner is correct that one of the convictions listed in the PSR and considered by the Court has been vacated.

However, Petitioner is incorrect that the vacation of the 2009 conviction would affect the validity of his sentence. In addition to the 2009 conviction, the PSR outlined four[2] additional prior convictions. (PSR ¶¶ 31-4.) The Court considered all five of these convictions when sentencing Petitioner. (Sent. 7:10-12.)

Because the controlled substance at issue in all of these convictions was crack cocaine, a Schedule II substance, 35 P.S. § 780-104(2)(i), these convictions were felony offenses carrying a maximum period of imprisonment of fifteen years. 35 P.S. § 780-113(f)(1). Thus, all four of these convictions qualify as "serious drug offense[s]." 18 U.S.C. § 924(e)(2)(A)(ii). With his conviction under 18 U.S.C. § 922(g) and with more than three, prior, serious drug offense offenses, Petitioner was subject to a mandatory minimum of fifteen years in prison. 18 U.S.C. § 924(e). Even without the 2009 conviction, these four additional convictions provided the grounds for his sentence.

Moreover, even if the Court's consideration at sentencing of the two convictions not included in the Plea Agreement was in error – which it was not – claims about errors in computing sentences are exactly the types of claims that this appellate waiver is meant to prevent. "[A]llowing alleged errors in computing a defendant's sentence to render a waiver unlawful would nullify the waiver based on the very sort of claim it was intended to waive." *United States v. Corso*, 549 F.3d 921, 931 (3d Cir. 2008) (quoting *United States v. Smith*, 500 F.3d 1206, 1213 (10th Cir. 2007) (internal citations omitted)). In *Corso*, the Third Circuit held that an erroneous application of enhancement did not constitute a miscarriage of justice. *Id.*

[2] The Court notes that the two convictions from October 20, 2006 can be counted as two separate convictions. "[I]ndividual convictions may be counted for purposes of sentencing enhancement so long as the criminal episodes underlying the convictions were distinct in time." *United States v. Schoolcraft*, 879 F.2d 64, 73 (3d Cir. 1989). While the sentencings were conducted on the same date, the crimes underlying the two convictions concerned episodes from distinct dates. These may be counted as two distinct prior convictions. The other two remaining convictions occurred on September 3, 2004 and November 28, 2006.

Enforcement of Petitioner's appellate waiver as to this claim would not constitute a miscarriage of justice.

IV. Conclusion

Petitioner entered into his Plea Agreement knowingly and voluntarily. As such, the Plea Agreement is enforceable. None of the exceptions outlined in his Plea Agreement apply. Moreover, because the vacated 2009 conviction was only one of five used to find that Petitioner was a career criminal, the vacation of the 2009 conviction does not affect the validity of Petitioner's sentence. Thus, enforcement of the waiver as to Petitioner's claim does not constitute a miscarriage of justice. Petitioner's Motion is denied and dismissed. A certificate of appealability shall not issue.

BY THE COURT:

/s/ C. Darnell Jones, II

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C. Darnell Jones, II J.

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA	:	
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Petitioner.	:	

ORDER

AND NOW, this 27th day of October, 2015, upon consideration of Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, (Dkt No. 26), the Government's Response thereto, (Dkt No. 34), and Petitioner's Reply in support thereof, (Dkt No. 34), it is hereby ORDERED that:

1. The Motion is DISMISSED WITH PREJUDICE in its entirety for the reasons stated in the accompanying Memorandum of Law;

2. A certificate of appealability shall not issue;

3. The Clerk of Court is DIRECTED to close this case for statistical and all purposes.

BY THE COURT:

/s/ C. Darnell Jones, II

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C. Darnell Jones, II J.